4

FILE COPY

FILED
MAR 5 1935

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 625.

REALTY ASSOCIATES SECURITIES CORPORATION and REALTY ASSOCIATES, INC.,

Petitioners,

vs.

EUGENE F. O'CONNOR, JR., FRED L. GROSS, HOMER E. PALMER, et al., ALMON G. RASQUIN, ELIZA B. CARMAN, et al., BONDHOLDERS' COMMITTEE of which WILLIAM E. KENNEDY, JR., is Chairman, MANUFACTURERS TRUST COMPANY and BONDHOLDERS' COMMITTEE of which FREDERICK S. ROBINSON is Chairman.

BRIEF OF PETITIONER, REALTY ASSOCIATES, INC.

JAMES N. ROSENBERG,
Counsel for Petitioner,
REALTY ASSOCIATES, INC.

INDEX.

	PAGE
The Statute Involved	2
POINT I.—In a composition providing that bondholders are to receive fifteen percent of their claims in cash and are to retain their bonds so reduced in amount by this fifteen percent payment and modified in other respects, the fees of the Referee should not be computed on the face value of the bonds retained by the bondholders	2
Meaning of words "To Be Paid" and "Upon"	2
Intent of Congress to limit fees of Referees in compositions to one-half of what they would receive in administrations, effectuated by decision of District Court	4
POINT II.—General Order XLVIII of the Supreme Court supports rather than opposes the position here urged	5
Conclusion	5

CITATIONS.

Cases:	PAGE
In re Batterman Co., 231 Fed. 699	4
Geddes v. *Anaconda Copper Co.*, 254 U. S. 590	3
Meek v. *Centre County Banking Co.*, 268 U. S. 426, 434	5
In re Mills Tea & Butter Company, 235 Fed. 815	4
Orcutt Company v. *Green*, 204 U. S. 96, 102	5n
West Company v. *Lea*, 174 U. S. 590, 599	5n
Statutes:	
Bankruptcy Act of 1898 with Amendments:	
Section 12	5
Section 30	5n
Section 40a	2, 4
Section 74	5
General Order XLVIII	5

Supreme Court of the United States,

OCTOBER TERM, 1934.

No. 625.

REALTY ASSOCIATES SECURITIES CORPORATION and REALTY ASSOCIATES, INC., *Petitioners,*

vs.

EUGENE F. O'CONNOR, JR., FRED L. GROSS, HOMER E. PALMER, et al., ALMON G. RASQUIN, ELIZA B. CARMAN, et al., BONDHOLDERS' COMMITTEE of which WILLIAM E. KENNEDY, JR., is Chairman, MANUFACTURERS TRUST COMPANY and BONDHOLDERS' COMMITTEE of which FREDERICK S. ROBINSON is Chairman.

BRIEF OF PETITIONER, REALTY ASSOCIATES, INC.

This petitioner is a corporation associated with the bankrupt but is an entirely separate entity. It proved a claim as creditor of the bankrupt in the sum of about Two Million Dollars (R., p. 22), which was duly allowed.

The statements of facts, issues, and the specifications of error contained in the brief of petitioner, Realty Associates Securities Corporation, the bankrupt, are adequate and accurate and, therefore, are not here repeated.

The Statute Involved.

Section 40a of the Bankruptcy Act provides:

> "Referees shall receive as full compensation for their services, payable after they are rendered, a fee of fifteen dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, and twenty-five cents for every proof of claim filed for allowance, to be paid from the estate, if any, as a part of the cost of administration, and from estates which have been administered before them one per centum commissions on all money disbursed to creditors by the trustee, or one-half of one per centum on the amount to be paid to creditors upon the confirmation of a composition."

POINT I.

In a composition providing that bondholders are to receive fifteen percent of their claims in cash and are to retain their bonds so reduced in amount by this fifteen percent payment and modified in other respects, the fees of the Referee should not be computed on the face value of the bonds retained by the bondholders.

The pertinent portion of Section 40a, the construction of which is involved on this appeal, is:

> "Referees shall receive as full compensation for their services * * * one-half of one per centum on the amount *to be paid* to creditors *upon* the confirmation of a composition."

Meaning of words "To Be Paid" and "Upon".

Section 40a thus provides that the Referee's per centum is to be computed on the amount *"to be paid"* to creditors *"upon"* the confirmation of the composition. It does not state that the fee is to be based on what is "promised to be paid". It does not base the compensation on an amount

which *may be paid pursuant to* or *after* the confirmation of the composition.

The words "to be paid" and "upon" are decisive. A reasonable interpretation of these words requires a reversal of the decree below.

Assume the ordinary case of a composition in which a creditor receives 50% of his claim in cash and 50% in notes of the bankrupt; the cash being payable forthwith upon the confirmation of the composition and the notes maturing at some later date. The questions presented are these. Is the Referee's commission to be based solely on the cash to be paid? Or, is it to be based upon the cash to be paid plus the face value of the notes? Or, is it to be based upon the cash plus the present actual cash market value of the future maturing notes?

Strictly speaking the statute might well be construed to mean that the Referee is to be paid only upon the 50% cash payable upon confirmation. That is what the words "paid" and "upon" might fairly be claimed to denote because that is all that is *"paid" "upon"* the confirmation. To permit the Referee to receive, in addition to his percentage on the cash actually paid, a percentage based on the present cash value of the promises evidenced by the notes is to give the statute a liberal construction in the Referee's favor.

The most that can reasonably be claimed to have been paid at the time of confirmation in the case at bar is cash plus the present cash value of the future obligations of the bankrupt. In this case the present cash value of the future maturing obligations of the bankrupt was readily determined because these obligations were dealt in publicly and had a current market value, adequate proof of which was presented to the District Court (R., pp. 68, 71 et seq.). This Court has held that securities having a market value are the equivalent of cash.

Geddes v. *Anaconda Copper Co.*, 254 U. S. 590.

Hence the Referee, under the decision of the District Court

in the case at bar, received his full commissions based on what in actuality amounted to the cash received by creditors.

The construction here urged was sustained by the District Court which followed the *ratio decidendi* of the decisions in:

In re Batterman Co., 231 Fed. 699;
In re Mills Tea & Butter Company, 235 Fed. 815.

That the construction of the District Court accords with the intention of Congress is borne out moreover by the following: In the ordinary composition case, as is well known, the services required of a Referee are far less exacting than they are in the ordinary case of administration. It was doubtless for this reason that Congress provided that the Referee's compensation in compositions shall be only half of what it is where a case is administered and liquidated (See Sec. 40a, supra). If the estate herein had been administered and had realized 37% of creditors' claims after three or four years of liquidation (the creditors herein indicated that they estimated that liquidation would not result in a greater amount by taking fifteen per cent in cash and bonds which, after such fifteen per cent payment, had a market value of twenty-two) there would have been a probable estate amounting to about Five Million Dollars ($5,000,000.) to wit: 37% of Thirteen Million Dollars ($13,000,000), the approximate amount of the claims of creditors. On such a realization the Referee, after a number of years of laborious effort, would have received one per cent on Five Million Dollars ($5,000,000), namely, Fifty Thousand Dollars ($50,000). The intention of Congress to allow a Referee half as much in a composition as in an administration was therefore admirably applied and justly and sensibly carried out in the case at bar by the decision of the District Court under which the Referee received Twenty-four thousand Sixty-four and 87/100 Dollars ($24,064.87) (R., p. 97) for services extending over a period of less than ten months (R., pp. 2-4).

POINT II.

General Order XLVIII of the Supreme Court supports rather than opposes the position here urged.

Counsel for the Referee urges that the rule of this Court in reference to extensions under the recent amendment to the Bankruptcy Act (Section 74) supports the Referee's contention. Quite the contrary. *Expressio unius est exclusio alterius.* The fact that the Supreme Court declared that in extension proceedings pursuant to Section 74 (as contra distinguished from composition proceedings pursuant to Section 12) the Referee's fee should be computed on the basis of the extended obligations, indicates that the Court declined, rather than that it intended, to make such a rule in reference to the ordinary composition in bankruptcy. Hence we submit that no inference can be drawn that the rule applicable to extensions is applicable to compositions. Moreover as this Court well knows and has pointed out, rules of court made *ex parte* may regulate procedure but cannot legislate or be in conflict with the statute. See, *Meek* v. *Centre County Banking Co.*, 268 U. S. 426, 434.*

CONCLUSION.

Just because a well intentioned bankrupt is willing to try eventually to pay his creditors one hundred cents does not mean that he has *paid* them one hundred cents. The

---

* "The authority conferred upon this court by §30 of the Bankruptcy Act to prescribe all necessary rules, forms and orders as to procedure and for carrying the Act into effect, is plainly limited to provisions for the execution of the Act itself, and does not authorize additions to its substantive provisions. *West Company* v. *Lea*, 174 U. S. 590, 599. And see, *Orcutt Company* v. *Green*, 204 U. S. 96, 102."

statute does not require, and common sense is shocked at the thought, that the Referee's commissions should be predicated on the bankrupt's hopes and promises.

The decision of the Circuit Court of Appeals should be reversed and the order of the District Court affirmed.

Respectfully submitted,

JAMES N. ROSENBERG,
Counsel for Petitioner,
REALTY ASSOCIATES, INC.